

**SANITIZED DECISION – 06-321 C – BY GEORGE V. PIPER, ALJ – SUBMITTED for  
DECISION on OCTOBER 11, 2006 – ISSUED on OCTOBER 19, 2006**

**SYNOPSIS**

**CONSUMERS’ SALES AND SERVICE TAX – TAXPAYER’S FAILURE TO CARRY BURDEN OF PROOF** -- The failure of a taxpayer to articulate adequate grounds in his petition for reassessment justifying his claim, combined with his failure to appear at a hearing and to present any evidence respecting his claim, will result in a denial of relief to the taxpayer. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

**CONSUMERS’ SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER** – An individual, who is an officer of a corporation, may be personally liable for the unpaid consumers’ sales and service tax liability of the corporation, including interest, additions to tax and penalties thereon, by virtue of his or her status as an officer. *See* W. Va. Code 11-15-17 [1978].

**CONSUMERS’ SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER** – Individuals who may be liable for the consumers sales tax liability of a corporation include the president, vice-president, secretary, or treasurer, any other officers provided for in the charter or by-laws of the corporation, and any other person who is elected or appointed to any position with the authority of an officer. W. Va. Code St. R. § 110-15-4a.5 (July 15, 1993).

**CONSUMERS’ SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER** – In order for an officer or other individual identified in W. Va. Code St. R. § 110-15-4a.5 (July 15, 1993) to be liable for any default in the payment of a corporation’s consumers’ sales and service tax liability, he or she must have the authority to perform duties or responsibilities in the management of the corporation. Such individual is liable if he or she has any actual managerial authority, regardless of whether he or she had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation, and regardless of whether he or she knew of the corporation’s default with respect to its consumers’ sales and service tax obligations. *See* 110 C.S.R. 15, §§ 4.a5 & 4a.5.2 (July 15, 1993).

**FINAL DECISION**

On April 15, 2006, the Unit Manager of the Accounts Monitoring Unit of the Internal Auditing Division of the West Virginia State Tax Commissioner’s Office (“the Commissioner”) issued an assessment for consumers’ sales and service tax against the Petitioner. The assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. The assessment was for the period of

January 1, 2002 through December 31, 2003, for tax in the amount of \$, interest in the amount of \$, computed through April 15, 2006, and additions to tax in the amount of \$, for a total assessed liability of \$. Written notice of this assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked May 16, 2006, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9 (a)-(b) [2002].

At the time scheduled for convening the evidentiary hearing, there was no appearance on behalf of the Petitioner. The evidentiary hearing was held, however, without an appearance on behalf of the Petitioner, in accordance with the provisions of W. Va. Code § 11-10A-10(a) [2002] and W. Va. Code. St. R. § 121-1-69.1 (Apr. 20, 2003).

### **FINDINGS OF FACT**

1. In his petition for reassessment, the Petitioner does not assert that he is not liable for the consumers' sales and service tax debt of the corporation; however he argues that the taxable amount should be lower because the door cover charges were actually lower than those found taxable in the assessment issued against the corporation.

2. The assessed consumers' sales and service tax liability resulted from a prior audit of the books and records of petitioner, which was never petitioned by said corporation and therefore remains due and owing *in toto* in the present proceeding.

3. The Petitioner signed a number of the checks by which the Corporation remitted consumers' sales and service tax to the State Tax Commissioner for periods not covered by the assessment.

4. The Petitioner was provided with notice that he was required to appear at the evidentiary hearing and present evidence respecting the reasons he believed that the assessment was erroneous, unlawful, void or otherwise invalid.

5. The Petitioner did not appear at the time and place of the hearing and presented no evidence respecting any of his allegations.

### **DISCUSSION**

In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against him is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; and W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003). The Petitioner asserts that any personal liability that he has for the consumers' sales and service tax debt of the corporation should be for a lesser amount because the door cover charges were actually less than those found to be due and owing against the corporation. The burden is, however, on the Petitioner to prove that he is not personally liable.

W. Va. Code § 11-15-17 [1978] provides:

If the taxpayer is an association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax penalties and interest thereon imposed by article ten of this chapter may enforced against them as against the association or corporation which they represent.

The provisions of this section, when read literally, make a corporate officer unconditionally liable for the consumers' sales and service tax of the corporation of which he is an officer, upon which the corporation defaults.

The absolute provisions of W. Va. Code § 11-15-17 are tempered by the provisions of the legislative rules promulgated by the State Tax Commissioner. The legislative rules provide, in relevant part:

4a.1. If the taxpayer is an association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the consumers sales and service tax and any additions to tax, penalties and interest thereon imposed by W. Va. Code § 11-10-1 et seq. may be enforced against them as against the association or corporation which they represent.

4a.2. A Corporation, the officers of which are liable for payment of the tax, is any corporation incorporated under the laws of this State, and any foreign corporation authorized to do business in this State or doing business in this State without such authorization.

. . . .

4a.4. There is a default by the corporation or association resulting in officer liability when: (a) the tax is shown on a tax return and the corporation or association neglects or fails to pay the tax within 15 days after notice and demand for payment; (b) the liability of the corporation is determined by an assessment and such assessment is final and not subject to administrative or judicial review and the corporation neglects or fails to pay the tax within 15 days after notice and demand for payment; or (c) when an assessment has not been made against the corporation or association and the corporation or association has not filed any return at the time required by law and has failed to file such return after notice of such failure.

4a.4.1. A default occurs whether or not a notice of tax lien has been filed against the corporation or association and whether or not the State has attempted to collect or failed to collect the tax from the corporation or association, and whether or not the corporation or association is defunct, dissolved, or insolvent.

. . . .

4a.5. The officers of a corporation or association that are personally liable for consumer sales tax include any president, vice-president, secretary, or treasurer, and any other officers provided in the charter or by-laws of the corporation or association, and any person who is elected or appointed to any position with the authority of an officer, and who performs duties or responsibilities in the management of the corporation. The officers of an association include all members of its governing board and its trustees. A person such as an

incorporator, shareholder, member or employee of a corporation or association is not considered to be an officer subject to personal liability.

....

4a.5.2. An officer may be liable whether or not the officer was under a duty to pay the tax or was responsible for the payment of the tax, for or on behalf of the corporation or association, and whether or not the officer acted willfully, or with the intent to evade the tax or payment thereof.

4a.5.3. The liability of a corporation, that is owned or controlled by a parent or other corporation, may be imposed on an officer of the other corporation, if such officer performs duties or responsibilities in the management of the taxpayer corporation.

By assessing the Petitioner, the State Tax Commissioner has created the presumption that the Petitioner meets the requirements for liability for the tax under the statute and the legislative rules. The presumption created is that the Petitioner is an officer of the corporation and that he had the authority to perform some managerial functions as an officer of the corporation. *See* W. Va. Code St. R. § 110-15-4a.5 and 4a.5.2 (July 15, 1993).

The evidence presented at the hearing demonstrates that the Petitioner is an officer of the Corporation. The Petitioner signed and filed returns on behalf of the corporation. The evidence presented also demonstrates that the Petitioner performed managerial duties on behalf of the corporation. Specifically, the Petitioner prepared and filed consumers' sales and service tax returns on behalf of the corporation and signed checks remitting tax to the State Tax Commissioner on behalf of the corporation. The Petitioner is an officer of the Corporation, performing managerial duties on behalf of the corporation. As such, this evidence is sufficient to show that the Petitioner is liable for the consumers' sales and service tax collected by the Corporation, but not remitted to the State Tax Commissioner.

The Petitioner has failed to rebut the presumption created by the assessment, either factually or as a matter of law. The allegations contained in his petition for reassessment do not

state legal grounds that are sufficient to rebut the presumption or otherwise show that the assessment is without a legal basis. Contrary to his assertion, the Petitioner may be liable as a corporate officer under W. Va. Code § 11-15-17. Moreover, the Petitioner failed to appear at the evidentiary hearing and present any evidence to contradict the evidence presented by the State Tax Commissioner, which demonstrates that the Petitioner satisfies the statutory standard for corporate officer liability. In fact, the law and the evidence in this matter clearly demonstrate that the Petitioner is personally liable for the corporation's consumers' sales and service tax liability.

It should be noted that because the assessment against the Corporation for the same amount was never contested before this tribunal, that liability remains fixed and may not, therefore, be reduced in this proceeding for any reason.

### **CONCLUSIONS OF LAW**

Based upon all of the above it is **DETERMINED** that:

1. For the period covered by the assessment in this matter, which are governed by legislatively approved consumers' sales and service tax regulations which became effective on July 15, 1993, a person who is in fact an officer of a corporation, is personally liable for the unpaid consumers' sales and service tax liability of the corporation by virtue of his or her status as an officer with any actual managerial authority, regardless of whether the officer had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation, and regardless of whether the officer knew of the corporation's default with respect to its consumers sales and service tax obligations. *See* W. Va. Code § 11-15-17 [1978] and W. Va. Code St. R. §§ 110-15-4a.5 & 4a.5.2 (July 15, 1993).

2. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against him is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

3. The Petitioner has failed to present evidence sufficient to show that he was not an officer of the Corporation or that he did not have any actual managerial authority with respect to the corporation during the time that he was a corporate officer thereof.

4. For the period covered by the assessment in this matter, the Petitioner is personally liable for the unpaid consumers' sales and service tax liability of the Corporation by virtue of his status as an officer of the corporation, because he had actual managerial authority (which he exercised) on behalf of the corporation during the time that he was a corporate officer thereof. *See* W. Va. Code § 11-15-17 [1978] and W. Va. Code St. R. §§ 110-15-4a.5 & 4a.5.2 (July 15, 1993).

## **DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax assessment issued against the Petitioner for the period of January 1, 2002 through December 31, 2003, for tax in the amount of \$, interest in the amount of \$, computed through April 15, 2006, and additions to tax in the amount of \$, totaling \$, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this consumers' sales and service tax assessment until this liability is fully paid.